IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 79-484

DONALD LEE WALTERS,

Petitioner,

vs.

JOHN L. McLUCAS, Administrator,
Federal Aviation Administration,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN ZINMAN

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Attorney for Petitioner

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCAITE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Donald Lee Walters, the petitioner herein (petitioner), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on May 29, 1979.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 597 F.2d 1230 (1979) and is printed in Appendix A hereto, infra, pages A-1 through A-6.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed by this petition was entered on May 29, 1979. There was no petition for rehearing of such judgment in the Court of Appeals. The jurisdiction of the Supreme Court to review the judgment of the Court of Appeals is by certiorari as provided in 28 U.S.C. § 1254(1). This petition is timely made, prior to September 28, 1979, pursuant to an Order Extending Time to File Petition for Writ of Certiorari made on August 20, 1979, by the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, as printed in Appendix B hereto, infra, page B-1.

(In an effort to comply with Rule 23(h)(i) of the Revised Rules of this Court which provides, in substance, that a petition for certiorari shall show the "time of entry" of the judgment or decree sought to be reviewed as well as the date of entry, counsel for petitioner telephoned the office of the Clerk of the United States Court of Appeals for the Ninth Circuit to ascertain whether the time of the entry of the judgment was recorded in the Office of the Clerk and learned it was not. Accordingly, of course, petitioner is unable to supply such information in this Petition.)

QUESTIONS PRESENTED FOR REVIEW

1. A regulation adopted by the Administrator of the Federal Aviation Administration (FAA) provides that no person who is convicted of violating any federal or state statute relating to the growing, sale, disposition, possession or sale of narcotic drugs, marihuana or depressant or stimulant drugs shall be eligible to have issued to him within

one year of the date of conviction an aircraft pilot's license; and also provides that any such conviction shall be grounds for suspension or revocation of any license previously issued. Petitioner, the holder of a pilot's license, suffered a conviction in a state court of the kind described in the regulation, and the FAA ordered his license revoked, in part, because of the conviction. Such action presents a question as to the validity of the regulation and as to whether as applied to petitioner by the FAA it represents an appropriate exercise by the federal executive branch of its police power.

2. In the administrative proceedings which led to revocation of petitioner's license a question was raised as to the "identity" of the person whom the FAA asserted was the pilot of an offending aircraft. The Administrative Law Judge before whom such proceedings were had ruled, in effect, that the petitioner had the burden of proving the true identity of the pilot. Such ruling presents the question for review of whether the

Administrative proceedings to which petitioner was subject were invalidly held because of an improper application of the appropriate burden of proof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment of the Constitution of the United States, which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property

be taken for public use, without just compensation.";

statutes enacted by the United States Congress, to wit: § 706 of Title 5 U.S.C. (Administrative Procedures) which reads:

"706. Scope of review. - To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

"(1) compel agency action unlawfully withheld or unreasonably delayed; and

"(2) hold unlawful and set aside agency action, findings, and conclusions found to be -

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege,

or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

"(D) without observance of procedure required by law;

"(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

"(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)";

§ 556(d) of Title 5 U.S.C. (Administrative Procedures) which reads:

"(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits

or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.";

and § 1421 of Title 49 U.S.C. which reads in part:

"(a) Minimum standards; rules and regulations

"The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

"(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

"(2) Such minimum standards governing appliances as may be required in the interest of safety;

"(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Secretary of Transportation, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Secretary of Transportation may accept in lieu of those made by its officers and employees;

"(4) Reasonable rules and regulations governing the reserve supply or aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall

be carried in flight;

"(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

"(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Secretary of Transportation may find necessary to provide adequately for national security and safety in air commerce.

"(b) Consideration of needs of service; classifications of standards, rules, regulations, and certificates

"In prescribing standards, rules, and regulations, and in issuing certificates under this sub-chapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform

their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Secretary of Transportation may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Secretary of Transportation shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or reoccurence of, accidents in air transportation, but shall not

deem himself required to give preference to either air transportation or other air commerce in the administration and en forcement of this subchapter.";

and a regulation adopted by the Administrator of the FAA, 49 C.F.R. § 61.15, which reads:

"§ 61.15 Offenses involving narcotic drugs, marihuana, and

"(a) No person who is convicted of violating any Federal or State statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, and depressant or stimulant drugs or substances, is eligible for any certificate or rating issued under this part for a period of 1 year after the date of final conviction.

"(b) No person who commits an act prohibited by § 91.12(a) of this chapter is eligible for any certificate or rating issued under this part for a period of 1 year

after the date of that act.

"(c) Any conviction specified in paragraph (a) of this section or the commission of the act referenced in paragraph (b) of this section, is grounds for suspending or revoking any certificate or rating issued under this part.

STATEMENT OF THE CASE

On the night of December 17, 1975, State of Arizona law enforcement officers were on lookout for drug smuggling activities at a remote desert airstrip. They saw a light aircraft being operated without lights moments before it landed. After the aircraft landed and after its engines were shut down, the officers approached it and questioned the pilot. He said his name was "Don Walters". They examined four documents which the pilot produced: a pilot's airman's certificate, a California automobile driver's license, a medical certificate and a radio telephone operator's certificate. Each of

these was in the name of and bore the signature "Donald Lee Walters".

The officers then inspected the aircraft and found its registration marks were concealed by a patch which showed false marks. Inside the cabin they found all but one of the aircraft's four seats had been removed and that twelve five-gallon cans of gasoline were in the cabin area.

On the following day an officer again inspected the aircraft and found its "tachometer cables", a device used to measure revolutions per minute of the aircraft's engines, had been disconnected.

No contraband substances were found in the aircraft, on the pilot's person or anywhere else in connection with the case.

The officers arrested petitioner for conspiracy to smuggle marihuana, a criminal offense under Arizona state law. Petitioner was not prosecuted for any criminal offense arising out of the incident.

Petitioner had earlier suffered a California state conviction for possession of marihuana for sale on February 13, 1974.

The FAA commenced proceedings to revoke petitioner's airman's certificate, or pilot's license, because of the California possession for sale conviction and because of violation of air safety regulations involved in the December 17, 1975, flight, i.e., the patch over markings, operation of the aircraft without lights and while the tachometer cables were disconnected. A hearing was had on the FAA's accusation, as provided by law, before an Administrative Law Judge. The Law Judge issued his initial decision to revoke petitioner's license. Petitioner appealed that decision directly to the National Transportation Safety Board (NTSB) which affirmed the Law Judge's decision. A true copy of the NTSB's Decision is annexed hereto as Appendix C, pages C-1 through C-13.

Petitioner then petitioned the United States Court of Appeals for

review of the NTSB's affirmance order. The Court of Appeals had jurisdiction to review the NTSB's order by virtue of 49 U.S.C. § 1903(d).

REASONS FOR GRANTING THE WRIT

Petitioner believes there are special and important reasons for granting the petition because the Court of Appeals in this case has decided an important question of federal law which has not been but should be settled by this Court and because the Court of Appeals has in this case decided a federal question in a way which conflicts with applicable decisions of this Court as hereinafter appears.

1. THE ADMINISTRATIVE REGULATION UNDER WHICH PETITIONER'S LICENSE WAS REVOKED IS INVALID BECAUSE IT IS IN EXCESS OF THE ADMINISTRATOR'S RULE MAKING POWER

In 49 U.S.C. § 1421, supra, a part of the Federal Aviation Act of 1958, the Congress empowered the Administrator to promulgate regulations for safety in air

commerce. The scope of the Administrator's authority is as specified in 49 U.S.C. § 1421, surpa. The preamble to the section provides the Administrator is empowered to and has the duty to "promote safety of flight". In order to accomplish this the Congress specifically empowered and required the Administrator to proscribe rules, in effect,

> (1) establishing minimum standards as to the design, construction and performance of aircraft;
>
> (2) establishing minimum standards as to aircraft appliances;
>
> (3) governing the inspection, servicing and repair of aircraft;
>
> (4) governing the reserve supply of aircraft;
>
> (5) governing the maximum hours or periods of service of air crew members; and
>
> (6) to establish such "reasonable rules and regulations, or minimum standards and procedures" as he might find necessary to "provide adequately for national security and safety in air commerce" (underlining by counsel).

The FAA caused petitioner's license to be revoked, in part, because of petitioner's 1974 California marihuana conviction pursuant to a regulation the Administrator adopted, 61.15, supra, to that effect. Such regulation, however, as it was applied to petitioner exceeded the Administrator's authority from the Congress because such authority was expressly limited by the enabling legislation, 49 U.S.C. § 1421(a), supra, which went no further than to empower the Administrator to adopt regulations as to matters specified by 49 U.S.C. § 1429(a)(1) through (5) which are patently inapplicable to petitioner, and as to 49 U.S.C. § 1429(a)(6) which limits such authority to situations involving "national security", also clearly not involved, and "safety in air commerce"

(underlining by counsel) which petitioner contends is also not involved in this case insofar as the regulation is concerned.

There is no conceivable, reasonable, or other relationship between a conviction for possession of marihuana for sale standing alone and safety in air commerce.

There is no intelligible, rational basis for reasoning that one convicted of possessing marihuana for sale presents, when later piloting an aircraft, simply because of such conviction, a hazard or an adverse factor as to safety in air commerce.

Because the regulation makes no effort to relate to air safety, it is in excess of the Administrator's authority and as such it was an illegal and inadequate basis upon which to premise the revocation of petitioner's pilot's license.

The Court of Appeals did not, in counsel's opinion, adequately and fairly consider this argument. That Court said

simply in its Opinion, page A-5 (Appendix A)

> "We hold that there is a rational relation between a conviction for the possession of drugs for sale and the unsafe use of aircraft for drugs smuggling, and that 61.15 is constitutionally valid."

One must fairly ask what that "rational relationship" is. Petitioner cannot discern the existence of any such relationship by any intelligent measure. Moreover, petitioner observes that the Court of Appeals' premise is improper since there was no evidence presented to the Law Judge that the aircraft was involved in drug smuggling.

There could conceivably be a relationship between a drug related criminal conviction or any criminal conviction and air safety if and only if the conviction in some way had something to do with operation or prospective operation of an aircraft. The regulation involved here contains no specification that could relate it to safety in air commerce.

A plain reading of the regulation makes it clear that it was enacted for punitive purposes, without any real consideration having been given to air safety factors. The Congress gave the Administrator no power or authority to adopt regulations for punishment purposes. The authority delegated the Administrator was to promulgate air safety and this, as applied to petitioner by 61.15, the Administrator did not do.

Besides being beyond the authority and power of the Administrator, the regulation is invalid for yet another reason; namely, it is an improper exercise of the police power of the executive. There is no "litmus test" by which the limit of restraint on government police power by judicial action may be measured. This Court's earlier classic statement of the rule, announced in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, seems still valid today:

> "To justify the state in interposing its authority in behalf of the public, it must appear -

> First, the interests of the public require such interference and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Petitioner does not dispute the power of the Administrator to adopt regulations to enhance air safety. He does, however, dispute the assertion of power to punish him without any demonstrated relationship to air safety by revocation of his license because of his earlier conviction of a crime which had no relationship to air commerce. Such action is beyond proper exercise of the executive's police power.

The Court of Appeals for the District of Columbia considered this question in James D. Rahm, petitioner, v. NTSB, respondent, case No. 74-1959 (Unpublished Memorandum of Opinion filed October 6, 1975, copy attached as Appendix D). That court held the regulation to be within the Administrator's power

because, said the Court:

> "In general, the commission of drug-related crimes indicates that the 'applicant would not be compliance-minded regarding the many requirements necessary for safety in air commerce . . . .' More specifically, a rational connection exists between past drug trafficking and future unsafe aircraft operations. A known drug trafficker is substantially more likely than the average person to engage in such traffic in the future."

Petitioner urges this reasoning be rejected. It cannot suffice to create in the Administrator a power not given him by the Congress.

2. THE REGULATION IS SUBJECT TO "VOID FOR VAGUENESS" INFIRMITY

The regulation is in three parts, subparagraphs (a), (b) and (c). Subparagraph (a) provides that one who has been convicted of any state or federal

law relating to growing, processing, manufacture, selling, disposing, possession, transporting or importation of drugs shall not be eligible to have a license issued to him "for a period of 1 year after the date of final conviction". Subparagraph (b) sets forth a like prohibition for a like effective period for those who operate an aircraft with knowledge that it carries drugs, referring to Federal Aviation Regulation 91.12(a) which reads:

> "Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft."

Read as a whole one who has suffered a described conviction can't have a license issued to him until 1 year after

the conviction is final but presumably would not be under disability if 1 year has elapsed; anyone actually found in the act of knowingly operating an aircraft which is carrying contraband can't have a license issued to him until 1 year after such illegal operation; and, as to someone who already holds a license, his license may be revoked or suspended irrespective of when the conviction occurred, and without limit as to duration, i.e., the conviction could have taken place at any time.

In this case the Administrator, relying on his regulation, reached back from the December 17, 1975 incident to an earlier conviction as a ground for revocation.

The test announced by this Court for application of the "void for vagueness" doctrine as applied to the federal government by the Fifth Amendment to the Constitution of the United States is whether the language of a statute or rule conveys a sufficiently definite warning so as to proscribe conduct when measured by common understanding and

practices, Jordan v. De George (1951) 241 U.S. 223, 71 S.Ct. 703; United States Civil Service Commission v. National Association of Letter Carriers (1973) 413 U.S. 548, 93 S.Ct. 2880.

Petitioner believes the regulation read as a whole by this measure is subject to the "void for vagueness infirmity" because a common reading of it would not give the reader fair warning of the effect of a conviction upon his license giving the lack of any time frame in subparagraph (c) and the inclusion of precise time frames in subparagraphs (a) and (b).

3. THE REGULATION DEPRIVES PETITIONER OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

"Due process" as a guaranty against conduct of the federal executive branch forbids invidious, unjustified classifications among and between citizens, Washington v. Davis (1976) 426 U.S. 229, 48 LED.2d 597, 96 S.Ct. 2040;

Examining Board of Engineers, Architects and Surveyors v. De Otero (1976) 426 U.S. 572, 49 LED.2d 65, 96 S.Ct. 2264.

The regulation to which petitioner was subjected creates such discriminatory invidious classification on the one hand, between those who might be convicted of a drug offense while unlicensed who may then wait 1 year and apply for a license free of disability, or those who might be found operating an aircraft with knowledge that contraband is on board (and these presumably would be licensed) who can then wait 1 year until they would be eligible for license free of disability; and on the other hand, between those, like petitioner, already licensed, who can find their licenses revoked or suspended for any transaction committed at any time without limitation and without the ability to find themselves free of disability on account of the passage of time.

4. THE ADMINISTRATIVE PROCEEDINGS WHICH RESULTED IN REVOCATION OF PETITIONER'S LICENSE WERE INVALID BECAUSE THE ADMINISTRATIVE LAW JUDGE APPLIED THERETO AN INAPPROPRIATE STANDARD OF PROOF

At the hearing before the Administrative Law Judge a question arose, on the Administrator's proof, as to the identity of the pilot of the aircraft during the December 17, 1975 incident. One of the state officers testified he was unable to positively identify the pilot as one and the same person as depicted on petitioner's automobile driver's license. In announcing his decision the Judge said, "In the face of all this, it is necessary for the pilot to come forth and say who he was if he was not Don Lee Walters (petitioner)."

Petitioner's quarrel with this is that, in effect, it placed the burden of proof in the proceedings as to identity on the petitioner, doing violence to § 556(d) of Title 5 which expressly recites, in part:

"the proponent of a rule or order has the burden of proof"

The burden this ruling placed upon petitioner was intolerable. In effect, it required him to generate proof which should legally have been part of his "accuser's" case against him.

The Court of Appeals seemingly chose to simply pass over this clear and simple mandate of the statute, saying simply at page A-6 (Appendix A). of the Opinion:

"Proof by a preponderance of reliable, probative, and substantial evidence is the standard."

citing 5 U.S.C. § 556(d), but not commenting upon or discussing that part of the section which expressly provides the burden of proof to be upon the proponent of an order, i.e., the Administrator.

CONCLUSION

For the foregoing reasons petitioner prays the Writ of Certiorari be granted.

Respectfully submitted,

MARVIN ZINMAN
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD LEE WALTERS,	)	
	)	
Petitioner,	)	No.
v.	)	77-1837
	)	
JOHN L. McLUCAS, Administrator,	)	
Federal Aviation Administration,	)	OPINION
	)	
Respondent.	)	

F I L E D
MAY 29, 1979

EMIL E. MELFI, JR.
CLERK, U.S. COURT
OF APPEALS

Petition to Review a Decision of the National Transportation Safety Board

Before: KENNEDY and HUG, Circuit Judges, and SOLOMON,* District Judge

Per Curiam:

Walters petitions this court to review an order of the National Transportation Safety Board (Board which upheld the revocation of his private pilot licensed by the Federal Aviation Administration. The basis for the revocation

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon sitting by designation.

were that he violated Federal Aviation Regulations and had been convicted of possessing marijuana for sale.

On the night of December 17, 1975, Deputies Chapin and Mergell of the Mojave County, Arizona Sheriff's Office kept watch for drug smuggling activities at an isolated and deserted airstrip. A few hours after the Deputies arrived, they heard a plane flying low over the airstrip. The Deputies did not see the plane until moments before it landed; until then the plane was being operated without lights.

When the engines were shut down, Chapin approached the plane and questioned the pilot. The pilot identified himself as "Don Walters." Chapin then examined four documents which the pilot produced: a pilot certificate, California driver's license, a medical certificate, and a radio telephone operator's certificate. Each document was in the name of and signed "Donald Lee Walters."

The Deputies inpected the plane and found that its registration marks were

concealed by a patch which showed false marks. Inside the cabin, where all but one of the four seats had been removed, the Deputies found 12 five-gallon cans of gasoline.

The pilot was arrested for conspiracy to smuggle marijuana.

On the following day, a third Deputy inspected the plane and found that the tachometer cables had been disconnected. Later, the Deputies found that the plane was owned and registered in California by the Petitioner's business partner.

In May 1976, the Federal Aviation Administration (FAA) revoked Petitioner's pilot license because of his 1974 marijuana conviction, 14 C.F.R. § 61.15,[1/]

1/ 14 C.F.R. § 61.15 provides that "(a) No person who is convicted of violating any Federal or State statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of . . . marihuana . . . is eligible for any certificate or rating issued under this part for a period of 1 year after the date of final conviction.

" . . . (c) Any conviction specified in paragraph (a) of this section . . . is

(continued)

and because of six violations of Federal Aviation Regulations committed during the flight on December 17, 1975.

Petitioner appealed asserting that 14 C.F.R. § 61.15 was invalid because it exceeded the FAA's statutory authority and because the FAA lacked "unequivocal" proof that he was the arrested pilot.

At a hearing before an Administrative Law Judge in September 1976, Deputy Chapin testified that the photograph on the driver's license was of the pilot he arrested.

Petitioner did not testify or call witnesses. The Judge found that the FAA proved, by a preponderance of "credible, reliable, probative, and substantial evidence," that Petitioner was the arrested pilot and that he violated Federal Aviation Regulations.

1/ (continuted)
grounds for suspending or revoking any certificate or rating issued under this part."

The Judge upheld the FAA order of revocation after rejecting Petitioner's contentions that section 61.15 exceeded the FAA's statutory authority and was constitutionally invalid.

Petitioner again appealed, this time to the National Transportation Safety Board. The Board held that section 61.15 is reasonably related to the safety purposes of the Federal Aviation Act, 49 U.S.C. § 1421 et seq. and that there is a rational connection between drug trafficking in the past and unsafe aircraft operations in the future. The Board also decided that the Judge applied the standard of proof on the issue of identity. It found no grounds for disturbing the Judge's findings of fact on that issue and affirmed.

In this court, Petitioner renews both challenges to the revocation order.

We hold that there is a rational relation between a conviction for the possession of drugs for sale and the unsafe use of aircraft for drugs smuggling, and that section 61.15 is constitutionally valid.

We also reject Walters' contention that the Judge applied the wrong standard of proof on the issue of identity. The Sheriff's Deputies' testimony made out a prima facie case that Petitioner was the pilot they arrested. The burden shifted to Petitioner to present evidence that he was not the pilot. Newman v. Shaffer, 494 F.2d 1219 (2nd Cir. 1974).

Walters presented no eivdence.

Proof by a preponderance of reliable, probative, and substantial evidence is the proper standard. 5 U.S.C. § 556(d). Here the agency met that standard.[2/]

The petition for review of the revocation order is therefore

DENIED.

2/ Even if the Petitioner were correct in contending that the identity issue must be proved by "clear, convincing, and unequivocal evidence," the evidence here satisfied that standard.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-149

DONALD LEE WALTERS,

Petitioner,

v.

JOHN L. McLUCAS, Administrator
Federal Aviation Administration

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 28, 1979

/s/ William H. Rehnquist
Associate Justice of the
Supreme Court of the
United States

Dated this 20th
day of August, 1979

APPENDIX C

SERVED: February 16, 1977

NTSB Order No. EA-963

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D. C. on the 11th day of February 1977.

JOHN L. McLUCAS, Administrator, Federal Aviation Administration, Complaint, v. DONALD LEE WALTERS, Respondent.	Docket SE-3294

OPINION AND ORDER

Respondent has appealed from the initial decision of Administrative Law Judge Robert R. Boyd, issued orally at the conclusion of the hearing held in this proceeding on September 23, 1976.1/

1/ An excerpt from the hearing transcript containing the initial decision is attached.

The law judge therein found that the Administrator had proven, by a preponderance of the credible, reliable, probative, and substantial evidence, the charges set forth in the complaint, as follows:

1. Respondent's airman certificate was subject to suspension or revocation, under the terms of section 61.15(c) of the Federal Aviation Regulations[2/] (FAR), by virtue of respondent's having been convicted, on February 13, 1974, in the Superior Court of the State of California, County of Riverside, of a violation of section 11359 of the California Health and Safety Code, to wit: possession of marihuana for sale.[3/]

2. With respect to a nighttime VFR (visual flight rules) flight conducted by respondent on December 17, 1975, in Piper PA-23-250, N4895) (property of another), in the vicinity of McCraken Airstrip (approximately 40 miles southeast of Yucca, Arizona), respondent was in violation of the following provisions of the FAR:

2/ Section 61.15(a) and (c) provides, in pertinent part, as follows:

"§61.15 Offenses involving narcotic drugs, marihuana, and depressant or stimulant drugs or substances.

(a) No person who is convicted of violating any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, and depressant or stimulant drugs or substances, is eligible for any certificate or rating issued under this part for a period of 1 year after the date of final conviction.

* * * * * * *

(c) Any conviction specified in paragraph (a) of this section or the commission of the act referenced in paragraph (b) of this section, is grounds for suspending or revoking any certificate or rating issued under this part."

3/ Respondent was sentenced to serve 6 months in the custody of the Sheriff of Riverside County. The conviction was affirmed by the California Court of Appeal and, on April 14, 1975, the Superior Court ordered execution of the sentence.

a. Section 91.33(a) and 91.33(c)(1), (2), and (3)[4/] in that respondent operated an aircraft in VFR flig light at night when it was without (1) an operating tachometer for each engine, (2), an approved anticollision light system, and (3) approved position lights.

4/ Section 91.33(a),(b)(4), and (c)(1), (2), and (3) provides, in pertinent part, as follows:

"§91.33 Powered civil aircraft with standard category U.S. airworthiness certificates; instrument and equipment requirements.

(a) General. Except as provided in paragraphs (c)(3) and (e) of this section, no person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

(b) Visual flight rules (day). For VFR flight during the day the following instruments and equipment are required.

* * * * * * *

(4) Tachometer for each engine.

(continued)

b. Section 45.21(a),[5/] in that respondent operated a U.S. registered aircraft without the required nationality and registration marks.

4/ (continued)

* * * * * * *

(c) Visual flight rules (night). For VFR flight at night the following instruments and equipment are required.

(1) Instruments and equipment specified in paragraph (b) of this section.

(2) Approved position lights.

(3) An approved aviation red or aviation white anticollision light system on all large aircraft, on all small aircraft when required by the aircraft's airworthiness certificate, and on all other small aircraft when required by the aircraft's airworthiness certificate, and on all other small aircraft after August 11, 1972. Anticollision light systems initially installed after August 11, 1971, on aircraft for which a type certificate was issued or applied for before August 11, 1971, must at least meet the anticollision light standards of Parts 23, 25, 27, or 29, as applicable, that were in effect on August 10, 1971, except that the color may be either aviation red or aviation white. In the event of failure of any light of the anticollision light system, operations with the aircraft may be continued to a stop where repairs or replacement can be made."

5/ Section 45.21(a) provides, in pertinent part, as follows:

(continued)

c. Section 45.21(b),[6] in that respondent placed on an aircraft a design mark, or symbol that modified or confused the nationality and registration marks.

d. Section 91.9,[7] in that respondent's operation of the aircraft under the above circumstances, and by virtue of carrying on board 12 plastic containers filled with aviation fuel, was careless so as to endanger the life or property of another.

The law judge thereupon affirmed the Administrator's order revoking respondent's private pilot certificate.

In support of his appeal, respondent, through counsel, has filed a brief wherein he argues that, with respect to the marihuana conviction, the regulations under which this conviction forms the basis of certificate action are constitutionally invalid and exceed the scope of authority delegated to the Administrator. Respondent further contends that, in regard to the incident of December 17, 1975, the Administrator has not proved by clear, convincing, and unequivocal evidence that respondent was the person who was the pilot of the aircraft involved in the alleged safety violations.

Upon consideration of the briefs of the parties, and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order of revocation.

5/ (continued)

"§45.21 General.

(a) Except as provided in §45.22, no person may operate a U.S. registered aircraft unless that aircraft displays nationality and registration marks in accordance with the requirements of this section and §§ 45.33."

6/ Section 45.21(b) provides, in pertinent part, as follows:

"§45.21(b) General.

* * * * * * *

(b) Unless otherwise authorized by the Administrator, no person may place on any aircraft a design, mark, or symbol that modifies or confuses the nationality and registration marks."

7/ Section 91.9 reads as follows: "No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

We adopt as our own the findings of the law judge.

In regard to respondent's first argument on appeal, it has been our consistent position that the Board lacks jurisdiction, and thus is not the proper forum, to consider attacks on the validity or wisdom of the Federal Aviation Regulations. We note, in any event, that a similar attack was made on section 61.15 of the FAR as part of an appeal from a previous Board decision[8/] to the U.S. Court of Appeals for the D.C. Circuit. The Court, in rejecting that attack, ruled that section 61.15 "is reasonably related to the statute's safety purpose" and that "a rational connection exists between past drug trafficking and future unsafe aircraft

8/ Administrator v. Rahm, Order EA-600, August 14, 1974. The Rahm case was alike the instant one in the significant respect that the marijuana conviction did not involve the utilization by the respondent of the priviliges of his airman certificate.

operations."[9/] Consequently, the validity of section 61.15 has been judicially affirmed.

Respondent's second argument is likewise without merit. He argues that the standard of proof which should have been applied to the pilot identity issue is clear, convincing, and unequivocal evidence. The only judicial decision cited in support of this stnadard is restricted by its terms to deportation cases.[10/] Safety enforcement proceedings adjudicated by the Board are governed by the Administrative procedure Act, which provides that sanctions may be imposed and orders issued only if "supported by and in accordance with the reliable, probative and substantial evidence."[11/] The Board has therefore applied the aforesaid standard of proof in enforcement cases, and the various courts of appeals, in reviewing

9/ Rahm v. N.T.S.B. Case No. 74-1959, (C.A.D.C. Oct. 6, 1975).

10/ Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

11/ 5 U.S.C. 556(d).

numerous Board decisions, have never indicated that any other standard should be applied.

In the instant case, the Administrator has clearly proven, by a preponderance of the reliable, probative, and substantial evidence, that respondent was the pilot of the aircraft involved in the incident of December 17, 1975.[12/] A narcotics enforcement team agent from the Mojave County Sheriff's Office, Kingman, Arizona, testified that, when the pilot embarked from the aircraft, he (the agent) asked the pilot for identification and was given a private pilot certificate, medical certificate, radio telephone operator permit, and state driver's license, all of which contained respondent's name and

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12/ Respondent's attorney, in his closing argument to the law judge, stated that "Under the circumstances in this case, I would admit that there is probative and substantial evidence with respect to the identity of the person who was flying the plane." (Tr. 50).

signature.[13/] In addition, when the pilot was asked who he was, he responded "Don Walters." Finally, another witness testified that he was informed that the registered owner of the aircraft involved in the incident was a partner of respondent.[14/]

From the evidence summarized above, it is apparent that the Administrator presented a prima facie case identifying respondent as the pilot of the plane in question. Respondnet presented no evidence whatsoever in rebuttal.[15/] and thus

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13/ The agent also testified that, while he was not absolutely positive the pilot matched the picture on the driver's license, he believed it "with the same authority . . . as if I looked at your driver's license and saw your picture and compared it to your face." (Tr. 33)

14/ The above testimony, although hearsay, is admissible as evidence in administrative proceedings.

15/ Respondent's rebuttal does not necessarily require him to establish that someone other than himself was the pilot as the law judge apparently indicated in his decision (Tr. 68). However, once the Administrator has established a prima facie case, the burden of going forward (continued)

the Administrator must be found to have borne the burden of proof on this issue.

Turning finally to the matter of sanction, it is our conclusion, considering the marihuana conviction in conjuction with the numerous violations associated with the incident of December 17, 1975, that revocation of respondent's airman certificate is fully warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal be and it hereby is denied:
2. The Administrator's order and the initial decision be and they hereby are affirmed; and
3. The revocation of respondent's private pilot certificate shall commence 30 days after service of this order.16/

15/ (continued) with the evidence shifts to the respondent. Respondent must then present some evidence tending to disprove that he was the pilot, or run the risk of a finding favorable to the Administrator.

16/ For purposes of this order, the respondent must physically surrender his (continued)

TODD, Chairman, BAILEY, Vice Chairman, McADAMS, HOGUE, and HALEY, Members of the Board, concurred in the above opinion and order.

16/ (continued) certificate to an appropriate representative of the Federal Aviation Administration purusant to section 61.19(f) FAR.

APPENDIX D

DJ#88-215 APPELLATE Mutterperl:LS

NOTE TO BE PUBLISHED

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 74-1959 September Term, 1975

James D. Rahm, Petitioner

v.

National Transportation Safety Board,
Respondent

PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL TRANSPORTATION SAFETY BOARD

Before: LEVENTHAL AND WILKEY, Circuit Judges and SOLOMON, * United States Senior District Judge for the District of Oregon

J U D G M E N T

This cause came on for consideration on a petition for review of an order of the National Transportation Safety Board and briefs were filed by the parties. On consideration of the foregoing, it is

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* Sitting by designation pursuant to 28 U.S.C. § 294(d)

ORDERED AND ADJUDGED by this Court that the order of the National Transportation Safety Board on review herein is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam

For the Court

/s/ Hugh E. Kline

Hugh E. Kline
Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED OCT 6, 1975

HUGH E. KLINE
Clerk

No. 74-1959 - James D. Rahm v. National Transportation Safety Board

MEMORANDUM

Petitioner appeals from the Opinion and Order of the National Transportation Safety Board,[1] which upheld the Initial Decision of the Administrative Law Judge[2] modifying the F.A.A. Emergency Order[3] revoking Petitioner's private pilot license. The modified order under review suspends Petitioner's license for eight months, pursuant to section 61.15 of the Federal Aviation Regulations.[4] That section provides that any conviction under a Federal or State statute relating to manufacture, sale, possession or transportation of drugs or marijuana is grounds for suspending or revoking any certificate or rating. Petitioner

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1/ N.T.S.B. Order No. EA-600, Docket No. SE-2283 (August 14, 1977)

2/ Opinion of Administrative Law Judge Charles A. Smith, March 27, 1974. Appendix, at 98.

3/ Emergency Order of Revocation, Case No. WE-73-OG-533 (July 24, 1973).

4/ 14 C.F.R. § 61.15

was convicted, upon a pleas of guilty, of conspiring to import marihuana in violation of 21 U.S.C. §§ 952, 963 (1970).[5/]

Petitioner attacks the Board's order on two grounds. First, he asserts that section 61.15 of the Federal Aviation Regulations is invalid on its face as exceeding the authority delegated to the Administrator under 49 U.S.C. § 1421 (a)(6). Second, he argues that even if the regulation is itself valid, its application to petitioner is not supported by substantial evidence, and therefore must be reversed.

I

Section 61.15 of the Federal Aviation Regulations provides, inter alia, that any conviction on a Federal or State drug offense is grounds for suspension or revocation of any pilot certificate or rating.[6/]

5/ United States v. James Douglas Rahm, Case No. WE-73-OG-533 (July 24, 1973).

6/ 14 C.F.R. § 61.15

The issue raised is whether the regulation is within the delegation to the F.A.A. Administrator, under 49 U.S.C. § 1421(a)(6), authorizing reasonable rules as "necessary to provide adequately for national security and safety in air commerce." For the reasons set out in the Notice of Proposed Rulemaking,[7/] we conclude that the rule is reasonably related to the statute's safety purpose. In general, the commission of drug-related crimes indicates that "the applicant would not be compliance-minded regarding the many requirements necessary for safety in air commerce . . . ." More specifically, a rational connection exists between past drug trafficking and future unsafe aircraft operations. A known drug trafficker is substantially more likely than the average person to engage in such traffic in the future. And a smuggler with access to a plane is likely to use it in a hazardous manner, flying low to escape detection by border surveillance. Although agencies do not

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7/ 34 Fed. Reg. 12713 (1969).

additional penalties for criminal offenses, the nexus between the Board's obligation to protect air safety and illicit smuggling justifies the instant regulation. It is no bar to the Regulation that it also advances a broader public policy of impairing illegal drug traffic.

II

The suspension is also challenged on the grounds that section 61.15 was improperly applied in this case, since nothing in Petitioner's conduct indicated a disposition to fly in an unsafe manner. Petitioner freely admits, however, his willful violation of the drug laws, which manifests at least a temporary lapse from the obedience to regulations which is the sine qua non of air safety in our crowded skies.

Petitioner did not actually use his airplane in the smuggling operation, and there is no evidence that he has flown it in an unsafe manner. However, Petitioner testified that on three separate occasions he used his aircraft to fly a

friend involved in the smuggling operation roundtrip across the country, for which he was paid $2,000.00. At the time of apprehension, Petitioner carried a briefcase filled with money and containing one marijuana cigarette. Moreover, Petitioner continues to have access to an airplane. All of these factors negate any conclusion that the order of suspension was an unreasonable and unnecessary application of section 61.15, in light of both the particular facts of Petitioner's individual case and the safety purpose which the regulation is designed to serve.